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ABSTRACT

The Supreme Court has ruled in several cases that schools must formulate rules and regulations that do not infringe on a student's right to free and unrestricted expression as guaranteed to them under the First Amendment. In two separate cases, the Court decided that students may wear buttons or armbands that express a particular position on an issue, and in a third case, that students may refuse to say the Pledge of Allegiance for religious reasons. Other court decisions, however, place the following limitations on students' freedom of expression: the state action rather than the private action must be the subject of the complaint; substantial disorder is not permitted in exercising First Amendment rights; school officials can restrict expression if the activity involved is an instructional exercise; and the age of a student is a factor in determining what constitutes appropriate expression. Other cases, presently pending in the courts, will further clarify the definition of student rights. (MAI)

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STUDENT FREEDOM OF EXPRESSION: A LIMITED FIRST AMENDMENT RIGHT

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The ever-increasing amount of litigation involving students is often held to signify their newly acquired sense of freedom, together with an unwillingness to acquiesce meekly, as in former days, to the dicta of their elders. But the other side of that argument is just as plausible: the litigation may signify a stubborn reluctance on the part of parents and school administrators to acknowledge that the right of free expression belongs to the untutored as well as to the learned. Student assertiveness and adult reluctance notwithstanding, it is a matter of settled law that First Amendment rights are available to students, albeit in a somewhat limited form. They do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, at 506 (1969).

The purpose of this paper is to outline some of the limitations on student freedom of expression as set forth by the courts. At the outset, however, it is well to note that the burden of proof is on the administrator to show that the expression is unprotected by the Constitution from prior restraint or subsequent punishment. And, contrary to the fond belief of some school administrators, it is clear that the State is not necessarily the master of what it creates. See Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

Constitutional Freedoms Applied

The first declaration by the U.S. Supreme Court that students enjoy First Amendment rights of free expression in the classroom arose out of a Vietnam era protest. In December 1965, a group of students in Des Moines decided to publicize their objections to the war in Vietnam by wearing black armbands. Local school rules provided for the suspension of students who refused to remove such armbands. When Mary Beth Tinker, 13, and Christopher Eckhardt, 16, wore their black armbands to school December 16, they were sent home following their refusal to remove them.

In ruling that such suspensions were impermissible under the First and Fourteenth Amendments, the U.S. Supreme Court referred approvingly to an appellate court decision involving black students in Philadelphia, Mississippi, who were denied the right to wear "freedom buttons" while attending school. The lower court had held that:

> In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide

> latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. . . . [School officials] cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do [sic] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Burnside v. Byars, 363 F.2d 744, 748, 749 (5th Cir. 1966).

Writing for the majority in the Tinker case, Mr. Justice Fortas said:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

Limitation: Private Action

The First Amendment refers expressly to the federal government in its prohibition against abridgement of speech or press: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S.C.A. Const. Amend. 1 (emphasis added). But this prohibition was held in Gitlow v. New York, 268 U.S. 652 (1925), to apply to the states through the Fourteenth Amendment, which states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or [sic] shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S.C.A. Const. Amend. 14 § 1.

In 1943 the U.S. Supreme Court expressly applied the Gitlow dictum to boards of education as agents of the State. The case involved a requirement by the West Virginia Board of Education that all schoolchildren salute the Flag of the United States while reciting the familiar Pledge of Allegiance. The plaintiffs, members of Jehovah's Witnesses, refused to salute the flag in the belief that a literal reading of Exodus, chapter 20, verses 4 and 5, commanded otherwise. The Supreme Court held that:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform

> within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

But it would be a mistake to conclude that the Constitutional right of free expression may be asserted by any student at any school. The concept of "state action" which rendered West Virginia powerless to punish student refusal to salute the flag does not similarly restrict private educators. It is the State and its subdivisions which are inhibited by the strictures of the First Amendment through the Fourteenth. This is clearly illustrated in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), a case involving suspension of students for conducting an unauthorized demonstration during a military review on Parents Day at Alfred University, a private school in New York. The students objected that they were being penalized for exercising their right to free speech as guaranteed by the First and Fourteenth Amendments. The Court of Appeals for the Second Circuit dismissed this contention as "unpersuasive," holding that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint." 407 F.2d at 81.

Limitation: Substantial Disorder

Another limitation on the First Amendment freedoms granted in the Tinker case involves disorder caused by those who are attempting to exercise their right of free expression. The sweep of the opinion in that decision did not immunize disruption in the name of the First Amendment. This limitation on expression was made abundantly clear by Mr. Justice Fortas when he wrote:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. 393 U.S. at 513.

The Court of Appeals for the Fifth Circuit cited this qualifier in a 1973 decision denying First Amendment protection for student demonstrations in Port Allen, Louisiana. On January 19, 1972, over 100 black students at Port Allen high school were suspended because of a demonstration on school grounds. They were afforded no hearing prior to suspension, and the district court ordered them reinstated. Two months later, some of the students and their parents filed a complaint with the federal district court, seeking a declaratory judgment that the disciplinary statute under which they had been suspended was violative of their First and Fourteenth Amendment rights. The U.S. district court refused the request, and on appeal the Fifth Circuit affirmed. In so doing, the court referred to Tinker: "Although a student does not discard his First Amendment rights upon entering the school house door, . . . the First Amendment does not

give individual students the right to disrupt openly the educational process in order to press their grievances." 472 F.2d 438, 442 (5th Cir. 1973). They have "no First Amendment right to convene their own assembly during school hours" (at 443) and there was "no violation of any First Amendment right by the school's refusal to accede to this form of rebellion" (at 444).

Two years later, the Fifth Circuit reaffirmed its decision in this case while extending it to cover disruptions on the college campus. In November 1972 several Grambling University students organized a boycott of classes on that Louisiana school's campus, and a violent disruption ensued. The students were suspended, and they challenged their suspensions as a violation of their First Amendment rights. But the court denied their claim, asserting that:

> Their actions were far from the "silent, passive expression of opinion unaccompanied by any disorder or disturbance" found in Tinker at 508 of 393 U.S. . . . The actions of appellants resulted in a material disruption of the campus and of the rights of others. They were not protected by the First Amendment. Jenkins v. Louisiana State Board of Education, 506 F.2d 999, 1003 (5th Cir. 1975).

Limitation: Instructional Exercise

Can school officials control expression when the vehicle for that expression is regarded as an instructional device? That question is not yet precisely decided, but the tendency of the courts has been to regard with some suspicion any attempt by administration figures to restrict expression on such grounds. The issue was confronted in Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971), when Dorothy Trujillo, managing editor of the Southern Colorado State College student newspaper, was suspended from her position following disagreement with the faculty adviser over two allegedly libelous articles. She sought reinstatement by court order. The college contended that the newspaper was under the control of the Journalism Department, that its purpose was to prepare students for a career in journalism through supervised work, and that the newspaper was therefore merely an instructional tool with copy subject to the adviser's approval. But the court held that testimony showed the newspaper had always been a forum for student expression and that, "Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not justified by an overriding state interest." 322 F. Supp. at 1270. The implication remains, however, that if the newspaper were truly an instructional tool and not a forum for expression, the holding might have been otherwise.

There is some support for this view in R. Trager and D. Dickerson, College Student Press Law (1976), at 22:

> [S]tudent publications that are structured with faculty members in key editorial posts, that are laboratory publications, or that have faculty advisers who carefully review copy may not be abridging students' freedom of expression if material is reviewed for form and not content, that is, if the purpose is to teach better journalistic or creative writing techniques and practices. The remedies used to correct problems found in the writing and editing may be the determining factor regarding the constitutionality of such actions.

Although the U.S. Supreme Court has not spoken on this issue, Chief Justice Warren Burger has indicated that in his opinion a university may not be required to make available its facilities for the publication of inferior writings. The case in point involved a student literary magazine at the University of Mississippi. The magazine, Images, was comprised of student materials published with the advice of the English Department, and its staff was selected by a faculty adviser who voted on all matters pertaining to publication and who taught a creative writing course which generated the bulk of the material for publication. In 1972 the University refused to bind the journal in its printing facilities or to allow distribution of the issue, after it learned that one of the stories contained repeated use of four-letter words. The Court of Appeals for the Fifth Circuit declined to permit the University the right to prohibit publication or distribution, but permitted the University to stamp on the magazine's cover the disclaimer that it was not an official publication of the school. Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973). A writ of certiorari to the Supreme Court was denied, but in a brief opinion the Chief Justice wrote: "Those attending a state university have a right to be free from official censorship in their speech and writings, but this right does not require the University to commit its faculty or financial resources to any activity which it considers to be of substandard or marginal quality." 416 U.S. 995 (1974).

Limitation: Age

The age of the student is a factor in determining whether some limitation may be imposed on his First Amendment rights. The U.S. Supreme Court made that distinction in Ginsberg v. New York, 390 U.S. 629, when it ruled that materials not obscene for adults could be defined as obscene for minors. This distinction became a part of student publication law in the Fourth Circuit when that court held that:

> Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed. . . .[A] difference may exist between the rights of free speech attaching to publications distributed in a secondary school and those in a college or university. Quarterman v. Byrd, 453 F.2d 54, 57, 58 (4th Cir. 1971).

The case involved a student at a North Carolina high school who was suspended twice for distributing without permission an "underground" publication. The regulation under which he was disciplined was declared invalid for lack of procedural safeguards, but not before the court made its point concerning age as a factor in judicial determination of the applicability of First Amendment rights.

Cases in Adjudication

Still making their way through the courts are two cases which ultimately may help resolve the uncertainties of their precedents. The first of these began in November 1976, when students at Hayfield Secondary School in Virginia attempted to publish in their newspaper an article entitled "Sexually Active Students Fail to Use Contraceptives." Their principal prohibited publication, contending that

school board policy proscribed sex education in the curriculum and that the school newspaper, The Farm News, was an integral part of the educational program. As an in-house publication, the principal contended, The Farm News was not a forum for student expression and hence was not protected by the First Amendment. But the federal district court ruled that a review of published articles revealed that the newspaper "was conceived, established, and operated as a conduit for student expression on a wide variety of topics. It falls clearly within the parameters of the First Amendment." 2 Med. L. Rptr. 1442, 1444, 1445 (E.D. Va. 1977). This decision was upheld October 18 in a 2-1 ruling of the Court of Appeals for the Fourth Circuit, which accepted the lower court's finding that the Farm News was a conduit for student expression and therefore was protected by the First Amendment. 3 Med. L. Rptr. note (October 25, 1977).

The second case still in adjudication involves students at Stuyvesant High School in New York City who wished to distribute a questionnaire to determine student attitudes, preferences, knowledge, and experience concerning such topics as pre-marital sex, contraception, homosexuality, and masturbation. Permission was denied, and the students sought an injunction against school authorities. The U.S. District Court for the Southern District of New York ruled that children as young as 13 and 14 years "may be too young and immature to be exposed to a comparison of their sexual attitudes and experience with that of their peers." 2 Med. L. Rptr. 1813, 1817 (S.D. N.Y., 1976). Hence the court prohibited distribution in the lower grades but permitted it in grades 11 and 12. An appeal was taken to the Court of Appeals for the Second Circuit, which reversed the order insofar as it restrained school authorities from prohibiting distribution to the upper two grades. The appellate court based its decision on the Tinker holding that "Invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513. In ruling for school authorities the court held that:

> Their action here is not so much a curtailment of any First Amendment rights; it is principally a measure to protect the students committed to their care, who are compelled by law to attend the school, from peer contacts and pressures which may result in emotional disturbance to some of those students whose responses are sought. The First Amendment right to express one's view does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences. 3 Med. L. Rptr. 1041, 1047 (2d Cir. 1977).

Conclusion

The First Amendment is not an absolute. Its unequivocal phraseology may lead one to conclude otherwise, but the U.S. Supreme Court has never interpreted it to indemnify all manner of speech. Even the most adamant of absolutists, Mr. Justice Black, held in his Tinker dissent that "It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases." 393 U.S. at 522. As for schoolchildren, he continued, they have not been sent to school at public expense to educate the public: "The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience

and wisdom which enabled them to teach all of their elders" (at 522). Even college students, who have not yet shed entirely the patina of naivete, are sometimes deceived on this point. One co-ed, upon being introduced to libel law and the concept of liability, murmured indignantly, "Whatever happened to free speech?" But each person must learn that freedom of speech carries with it responsibility for what one says. The adult world, no less than the world of the child, is circumscribed by myriad limitations on expression. The rude fact is that "free speech" is not entirely free.